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Nos. 09-1454 and 09-1478

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BOB CAMRETA,
Petitioner,
v.
SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR,
Respondent.

JAMES ALFORD,
Petitioner,
v.
SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal matters through academic research, litigation, and participation in the formulation of public policy. The Center regularly comments on issues of broad importance to the administration of the criminal justice system.

The Center files this *amicus* brief in support of the State of Oregon and urges the Court to announce a rule of clear and broad application for public school personnel and other state officials responsible for preventing or investigating child abuse. The Ninth Circuit's decision not only improperly applied fundamental Fourth Amendment principles, but also erected overly-burdensome, highly fact-dependent requirements that public employees must satisfy to protect children suspected of being abused.

Accordingly, the question presented is one of significant practical import in the daily enforcement and administration of criminal law by state actors. The Center has a strong interest in such matters and files this *amicus* brief to aid the Court in its review of the Ninth Circuit's decision.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Court's docket confirms that counsel for the parties have executed blanket consents to the filing of *amicus* briefs.

BACKGROUND

In February 2003, police arrested Nimrod Greene for allegedly sexually abusing a seven-year old boy. The boy's parents provided information to officers suggesting that Nimrod also molested his own two children, S.G. and K.G. The Oregon Department of Human Services was informed of these allegations after Nimrod's arrest. Upon learning that Nimrod had been released from prison, Bob Camreta, the social worker assigned to the case, interviewed nine-year-old S.G. at school and thus outside of the influence of her father. Deputy Sheriff James Alford accompanied Camreta, and the interview took place in a private office at the school. Alford wore a police uniform and had a visible firearm, but asked S.G. no questions. *See Greene v. Camreta*, 588 F.3d 1011, 1016-18, 1027-28 (9th Cir. 2009).

Camreta's and Alford's interview of S.G. forms a basis for the lawsuit brought under 42 U.S.C. § 1983 by Sarah Greene, the mother of S.G. and K.G. Among other things, Greene asserted that Camreta's and Alford's joint interview of S.G., without a warrant, parental consent, probable cause, or exigent circumstances, violated the Fourth Amendment.

The Ninth Circuit affirmed the grant of summary judgment to the state-actor defendants on qualified immunity grounds. Stating that it sought "to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment," *Greene*, 588 F.3d at 1022, however, the Ninth Circuit reviewed and reversed the district court's finding that the interview did not violate the Fourth Amendment. Specifically, the Ninth Circuit determined that the balancing test

employed in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), was inapplicable given that Camreta and Alford were not "school officials," and because the specific governmental interest at issue in *T.L.O.* (maintaining discipline in classrooms) was not present here. *Id.* at 1024-25. The Ninth Circuit further concluded that the "special needs" doctrine did not apply because of the degree of law enforcement "entanglement" with the interview of S.G. *Id.* at 1025-30. Instead, the Ninth Circuit applied "the general law of search warrants" and held that the warrantless interview of S.G. violated the Fourth Amendment. *Id.* at 1030.

SUMMARY OF ARGUMENT

The Center agrees with the State of Oregon that the Ninth Circuit erred by applying traditional Fourth Amendment principles and instead should have held that the interview here did not constitute a Fourth Amendment violation.

The Center urges the Court to go further, however, and announce a broad, categorical rule that public school and state child services officials do not violate a minor school child's Fourth Amendment rights by conducting an interview of the child predicated on reasonable objective indicia of abuse, even where the interview includes passive participation by law enforcement.

The proposed rule strikes the proper constitutional balance under the Court's precedents and accounts not only for the well-defined circumstances subject to the rule, but also for the need for clear and workable guidance for public school and other state officials. In practice, the rule would operate to protect children and their Fourth Amendment rights.

ARGUMENT

I. THE CENTER AGREES WITH PETITIONERS THAT THE NINTH CIRCUIT'S FOURTH AMENDMENT HOLDING SHOULD BE REVERSED

The State of Oregon is correct that the Ninth Circuit erred by giving controlling weight to the presence of a law enforcement officer during the interview of S.G. *See Greene*, 588 F.3d at 1027-28.

The Ninth Circuit's approach failed to recognize not only that S.G. was a potential victim and not a criminal suspect, *see Illinois v. Lidster*, 540 U.S. 419, 424 (2004), but also that Deputy Sheriff Alford did no more than accompany social worker Camreta to the interview. In short, given the State's paramount interest in protecting children, and the minimal intrusiveness of the in-school interview, the Ninth Circuit was wrong in the first instance to find a Fourth Amendment violation on the evidence before the District Court.

As explained below, however, the imperative of clear direction for public school and other state officials shouldering responsibility for responding to suspicions of child abuse strongly counsels in favor of the Court deciding this case on broader, categorical grounds.

II. THE COURT SHOULD DECIDE THIS CASE ON THE BASIS OF A BROAD, CATEGORICAL RULE APPLICABLE TO IN-SCHOOL INTERVIEWS OF POTENTIAL VICTIMS OF ABUSE

Reversing the Ninth Circuit's decision in a narrow opinion tethered to the facts and circumstances accompanying the interview of S.G. will do little to guide public school principals, teachers, and

counselors faced with indications of potential child abuse. Interviews of school children will hinge on assessments of factual similarities and differences between this case and the next, requiring public school personnel to navigate a "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions" that "may be 'literally impossible of application by the officer in the field.'" *New York v. Belton*, 453 U.S. 454, 458 (1981) (citation omitted). The investigation of potential child abuse is an area in which state actors have "an essential interest in readily administrable rules." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

The better approach is to decide the case on the basis of a categorical rule of general applicability to in-school interviews of child victims. This approach is available because the issue presented lends itself to a rule that, when applied in the school setting across a broad class of cases, will sufficiently protect a child's Fourth Amendment interests, while also strongly advancing the State's interest in protecting that same child by investigating indications of possible abuse.

Accordingly, the Center urges the Court to hold that public school and state child services officials do not violate a minor school child's Fourth Amendment rights by conducting an interview of the child predicated on reasonable objective indicia of abuse, even where the interview includes passive participation by law enforcement.

A. The Proposed Rule Strikes an Appropriate Constitutional Balance

1. The Proposed Rule Gives Effect to the Government's Strong Interest in Protecting Children

The beginning point is the government's extraordinarily strong interest in the health and welfare of children, including children entrusted to the state's care and development in public schools. This Court has underscored the weight of this interest on prior occasions. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling.") (citation omitted); *Wyman v. James*, 400 U.S. 309, 318 (1971) (stating that "[t]here is no more worthy object of the public's concern" than protecting the interests of dependent children); *see also Vernonia School Dist. v. Acton*, 515 U.S. 646, 656 (1995) (emphasizing "schools' custodial and tutelary responsibility for children").

Indeed, the sheer strength of the government's interest in protecting children has led this Court to reject other Fourth Amendment challenges to state action in the school setting. For example, in *T.L.O.*, the Court identified the "interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" as part of its rationale in upholding the search of a student's purse. 469 U.S. at 339. Similarly, in *Vernonia*, the Court rejected a Fourth Amendment challenge to suspicionless drug testing of students given the governmental interest in "[d]eterring drug use by our Nation's schoolchildren." 515 U.S. at 661.

The government's interest here in protecting children by investigating indications of potential abuse is markedly stronger than the interests implicated in *T.L.O.* and *Vernonia*. While maintaining discipline and averting potential drug use by student athletes are of undeniable importance, they pale in comparison to the government's interest in detecting and preventing abuse—here, potential sexual abuse of nine-year-old S.G. by her father, who had already been arrested for sexually abusing a seven-year-old boy.

2. The Proposed Rule Will Directly Advance the Government's Interest in Protecting Children

In assessing the proposed rule, the inquiry next turns to the degree to which the class of seizures at issue advances the identified governmental interest in protecting children. *Cf. Lidster*, 540 U.S. at 427 (employing same analytical approach).

From an empirical standpoint, investigations of potential child abuse result approximately 25% of the time in confirmation that abuse in fact has occurred. *See Greene*, 588 F.3d at 1015-16 (stating that of the 3.2 million investigations of child abuse conducted by state and local agencies in 2007, fully one quarter, or approximately 800,000, concluded that the children were indeed victims of abuse). This success, however, often depends entirely upon the government's ability to obtain information directly from victimized children, as other direct evidence of abuse seldom exists. *Cf. Kennedy v. Louisiana*, 128 S.Ct. 2641, 2663-64 (2008) ("Underreporting is a common problem with respect to child sexual abuse [because] one of the most commonly cited reasons for nondis-

closure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (stressing that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim," whose feelings of "unwillingness to come forward are particularly acute when the abuser is a parent.").

The Center's proposed rule would allow public school personnel, with passive participation by law enforcement, to obtain information about potential abuse from often the only individual capable of providing that information—the abused child. The rule, therefore, would directly advance the government's interest in detecting abuse and protecting children.

The nexus between the proposed rule and the government's interest is much tighter than ones this Court has determined sufficient in prior cases. For example, in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), the Court rejected a Fourth Amendment challenge to a highway sobriety checkpoint program that operated with a 1.6% success rate. *Id.* at 455. Similarly, in *Martinez-Fuerte v. U.S.*, 428 U.S. 543 (1976), the Court upheld a car-stop program designed to detect the presence of illegal aliens even though the program had only a 0.5% success rate. *Id.* at 554.

Here, the proposed rule would not only advance a vital governmental interest, but does so in an effective and efficient manner—by enabling access to a victim-witness, often the sole source of information about abuse. Given the minimal nature of the coun-

tervailing Fourth Amendment concerns, the constitutionality of the proposed rule is clear.

3. The Proposed Rule Reflects the Diminished Fourth Amendment Concerns Implicated Here

The Center's proposed rule, although broadly authorizing in-school interviews of children reasonably suspected of being abused, risks minimal intrusion of the child's privacy interests. This minimal intrusion is constitutionally reasonable given the government interest vindicated through the interview—and especially in light of the child's status as a victim-witness, and not a criminal subject or target. The interviews at issue here are neither accusatory nor adversarial, and thus do not bear any of the attributes implicating Fourth Amendment concerns applicable to law enforcement interaction with suspected criminals.

The Ninth Circuit committed fatal error on this point—altogether failing to recognize that the challenged government action (the interview of S.G.) was with an individual that the state reasonably believed needed its protective intervention and assistance, and therefore was outside the traditional setting of state officials interfacing with a subject or target. *Cf. Wyman*, 400 U.S. at 323 (upholding constitutionality of home visit by caseworker and stating that the caseworker "is not a sleuth, but rather, we trust, is a friend to one in need").

This Court's decision in *Lidster* is particularly instructive on these points. In *Lidster*—a case not cited by the Ninth Circuit—the Court analyzed the constitutionality of a community highway stop of potential witnesses to a hit-and-run accident. *Lidster*,

540 U.S. at 422. The Court rejected a Fourth Amendment challenge, emphasizing the "context" surrounding the government's establishment of the highway stop, most especially its purpose of "seeking information from the public." *Id.* at 424-25. This important "information-seeking" objective led to minimally-intrusive interactions between motorists and law enforcement—in circumstances in which the "concept of individualized suspicion had little role to play." *Id.* at 424. "The police," the Court underscored, "expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals." *Id.* at 423.

The "context"-based approach that guided the Court's analysis in *Lidster*—namely, the government's non-adversarial efforts to acquire information—similarly informed the Court's reasoning in *Vernonia*. There the Court upheld a school drug-testing program "undertaken for prophylactic and distinctly *non*-punitive purposes." *Vernonia*, 515 U.S. at 658 & n.2 (emphasis in original).

The Court's approach in *Lidster*, which emphasizes "context," applies with greater force where, as here, the information yielded in interviews is used to protect the very individual who provided it:

> [T]he government's interest is primarily in protecting the child, not in restricting the child's freedoms. Therefore, when courts are called upon to balance the child's Fourth Amendment rights with the government's interests, it is important to recognize that the child's interests may align with the government's

> interests if, indeed, the child is at risk of abuse.

Gates v. Texas Dep't of Protective & Regulatory Servs., 537 F.3d 404, 427-28 (5th Cir. 2008).

The Center's proposed rule, unlike the Ninth Circuit's analysis, also gives effect to the contextual fact that the authorized interviews would occur within a school. Location, in other words, is a critical contextual factor because the Court has observed that Fourth Amendment rights "are different in public schools" than in other places. *Vernonia*, 515 U.S. at 656; *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (explaining that "the public school environment serves as the backdrop for the analysis of the privacy interest at stake"); *Gates*, 537 F.3d at 432 ("seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited.").

Finally, the government action challenged here—in-school interviews—also is substantially less intrusive than searches and seizures upheld in prior school-setting cases. For example, in *T.L.O.*, 469 U.S. 325, the Court rejected a Fourth Amendment challenge to the search of a female student's purse conducted by a vice principal who suspected the student had been smoking in the school bathroom. Similarly, the Court has upheld a mandatory drug testing program for student athletes, *see Vernonia*, 515 U.S. 646, even though the law traditionally has afforded drug test samples great privacy protection, *see Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

4. The Proposed Rule Contains Important Limitations to Protect the Privacy Interests of Children

The Center's proposed rule would not authorize any and all in-school interviews of children to garner information about potential abuse. To the contrary, the rule contains express limitations designed to ensure that the initiation of interviews and governmental conduct during interviews respect Fourth Amendment boundaries.

First, the rule would require any interview to be predicated on a reasonable and objective indication of abuse. This standard, therefore, prohibits random questioning and instead rests on the familiar footing of *Terry*. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (observing that in assessing the reasonableness of an officer's actions "due weight must be given, not to [an officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience"). Moreover, because it is predicated on the likelihood of abuse, not on any crime, the rule is appropriately and narrowly tailored.

Second, consistent with this Court's prior cases, the Center's proposed rule, contrary to the Ninth Circuit's analysis, would authorize the passive participation by law enforcement in interviews. *Cf. I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) (explaining that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation"); *see also Lidster*, 540 U.S. at 425 (observing that "the law ordinarily permits police to seek voluntary cooperation of members of the public in the investigation of a

crime" and "citizens will often react positively when police simply ask for help").

This limitation is easily respected where a law enforcement officer functions as a witness to the interview and thus plays only a passive role in questioning the child. Permitting the officer to play an expanded role risks the proposed rule authorizing warrantless in-school interviews conducted solely by police—a circumstance perhaps not amenable to being governed under a broad rule of general application.

To be sure, however, allowing for passive participation of law enforcement is appropriate and, indeed, necessary given the unique and complementary role of law enforcement in ensuring the ongoing welfare of children. Although child services agencies can remove a child from a troubled home, it is the responsibility of law enforcement to render that child's home permanently safe by arresting and prosecuting the abuser. Those states with laws permitting joint social services and law enforcement interaction in child abuse circumstances have recognized the complementary roles played by these two arms of government in ensuring the welfare of children. *See, e.g.*, *Greene*, 588 F.3d at 1028 (discussing Oregon statutory framework governing joint child abuse investigations). The Center's proposed rule respects these policy determinations.

B. The Circumstances Here Warrant the Announcement of a Broad, Categorical Rule to Guide Public School and Law Enforcement Personnel

The Court's choosing to decide this case on the basis of a broad rule applicable to in-school inter-

views of children would adhere closely to the course charted in prior Fourth Amendment cases. In those instances, the Court has answered questions arising out of particular facts by announcing rules of general applicability. The rules, in turn, provide important guidance to state officials likely to encounter recurring factual circumstances within a common category of cases. Prominent examples include:

- *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court announced a broad "stop and frisk" rule applicable to the innumerable circumstances in which police reasonably suspect criminal activity afoot.
- *U.S. v. Robinson*, 414 U.S. 218 (1973), where the Court held that the Fourth Amendment licensed searches incident to arrest.
- *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), where the Court announced the rule authorizing police officers to order the driver out of a vehicle when that vehicle has been lawfully detained.
- *Maryland v. Buie*, 494 U.S. 325 (1990), where the Court held that the Fourth Amendment permits limited protective sweeps of areas within homes in which dangerous individuals may be present.

These decisions have several factors in common—each of which combined to provide the Court sufficient comfort that a broad rule of general application was appropriate. First, the particular disputes arose within a well-defined class of searches or seizures where individual cases recurred with frequency and presented similar individual factual circum-

stances. Second, the Court determined that the issue presented was amenable to the formulation of a broad rule that, when applied across many facts and circumstances within a class of cases, would strike the proper constitutional balance in each individual case. Third, in each case, the circumstances presented counseled in favor of government personnel receiving clear guidance for acting in what often are time-sensitive situations. Fourth, the Court's announcement of a broad rule promoted consistent outcomes in cases within the affected class.

Each of these factors is present here. The Fourth Amendment question at issue arises only in the limited and well-defined setting of public schools and against the backdrop of school officials confronted with time-sensitive needs to respond to reasonable suspicions of child abuse—a frequently occurring circumstance. *Cf. Greene*, 588 F.3d at 1015 (observing that the "number of child abuse allegations is staggering," with, for example, "state and local agencies [having] investigated 3.2 million reports of child abuse or neglect" in 2007 alone).

When reasonable suspicions of abuse present themselves in the school setting, teachers, counselors, and principals, along with the law enforcement community, need clear rules to guide their decision making on how to proceed. *See Belton*, 453 U.S. at 458 (emphasizing that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront") (internal quotations omitted) (citation omitted); *Robinson*, 414 U.S. at 235 (applying similar reasoning to justify searches incident to arrest). A clear rule would not only benefit

state actors, but also would enhance judicial efficiency by eliminating the need for fact-specific inquiries and the possibility of conflicting outcomes across individual cases.

In addition, from a constitutional perspective, the issue presented is amenable to being answered with a broad, categorical rule of decision. Across the overwhelming majority of affected cases, the government's interest in protecting children is exceedingly strong, and the corresponding level of intrusion is negligible, thereby minimizing the possibility that the rule will result in a constitutional violation in any specific case.

In the end, then, the Center's proposed rule would provide clear guidance while also holding state officials accountable to the rule's limitations. The rule also strikes the proper balance in another important, reinforcing dimension—it protects the health and welfare of children as well as their Fourth Amendment rights.

CONCLUSION

For these reasons, this Court should reverse the Ninth Circuit's decision on the basis of the rule advanced by the Center.

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Respectfully submitted,

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